

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution)	WC Docket No. 06-122
Methodology)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
1998 Biennial Regulatory Review -)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with)	
Administration of Telecommunications)	
Relay Service, North American Numbering)	
Plan, Local Number Portability, and)	
Universal Service Support Mechanism)	
)	
Telecommunications Services for Individuals with)	CC Docket No. 90-571
Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Telephone Number Portability)	CC Docket No. 99-200
)	
Truth-in Billing and Billing Format)	CC Docket No. 95-116

**PETITION FOR CLARIFICATION, OR IN THE ALTERNATIVE, APPLICATION FOR
REVIEW**

I. Introduction and Background

Masergy Communications Inc. (“Masergy”) requests that the Wireline Competition Bureau (“Bureau”) issue a clarification regarding the recent release of the 2009 Form 499-A instructions. Instructions to the Telecommunications Report Worksheet, FCC Form 499-A

(2009) (“Instructions”) were recently amended to include Multi-Protocol Label Switching (“MPLS”) in the list of telecommunications services subject to Universal Service Fund (“USF”) contribution. The addition of the term “MPLS” into the Form 499-A occurred for the first time within the 2009 Instructions released by the Bureau under Delegated Authority.¹ As a global provider of wide area network solutions that includes IP VPN-based MPLS services, Masergy requests that the Bureau issue a clarification of the term “MPLS” as used in the Instructions to indicate that the MPLS subject to USF contribution is solely the local transmission line features often sold as a portion of the basket of services that are generally referred to as MPLS. In addition to a transmission component which can be included, MPLS is, among other things, a traffic information management service that can be sold and marketed separately from transmission and access services. As such, a portion of “MPLS” services constitute an information service not subject to Universal Service Fund (“USF”) contributions. To the extent that the Bureau intended for the instructions to identify IP-VPN services such as MPLS as telecommunications services, then Masergy believes the Form 499-A instructions exceed the Bureau’s Delegated Authority to promulgate the Form 499-A instructions without changes in policy, and requests that this document be treated as an Application for Review by the Commission.²

Masergy further requests that the Bureau proceed expeditiously with a clarification for the following reasons:

- (1) To Masergy’s knowledge, the most common practice in the industry today is for carriers to collect USF surcharges on the underlying transport, primarily local access, but not to collect USF surcharges on MPLS (and VPLS as well) since it is an

¹ *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, DA 09-454 (Feb. 25, 2009).

² 47 C.F.R. § 1.115.

information service which can be sold separately or together with the underlying transport. In addition, Masergy believes that at least one carrier does not collect USF on either the MPLS information service or the underlying transport. While USF pass-through surcharges are discretionary, they are generally a good indication of how carriers are treating a service for USF reporting and contribution purposes.

- (2) The diversity of methods used by carriers in collecting USF creates an artificial competitive advantage in the market for carriers that do not collect USF on the underlying transport. Furthermore, if carriers are required to remit USF on the MPLS information service for the period dating back to January 2008, they will have to either back bill their MPLS customers, to the extent permitted, for this period or pay the USF without an opportunity to recover from customers, as is their right under Commission regulations.

For these reasons, Masergy respectfully requests that the Bureau issue a clarification on an expedited basis.

Masergy is an international network service provider that provides mission critical services to large corporate enterprises with multiple locations. It provides services on six continents and offers a wide range of services to increase efficiency and streamline communications including MPLS services with or without the access.

What is commonly referred to as “MPLS” is actually a unitary service with multiple components. MPLS includes both software port functions and transmission functions that cannot be separated. The software functions analyze traffic sent by the consumer and determine whether the traffic should be converted into a different format, expedited, stored for future transmission and similar distinctions based on the latency and quality of service needs of the data

in question. Similarly, MPLS can retrieve information using transmission via the public Internet, including the use of DNS naming and resolution and SMTP-based electronic mail. The transmission functions can include ATM, Frame Relay, Ethernet, public Internet or several other non-TDM transmission methods. Because the MPLS port functions clearly provide information services³ that are inseparable from the intermediate transmission between the ingress and egress points of an MPLS network, MPLS “inextricably intertwines” the information functions contained in the port with the intermediate transmission functions of an MPLS network.⁴

II. The Bureau Should Clarify that Non Access Portions of MPLS are an Information Service and Not Subject to USF Contributions

Wide area network communications solutions marketed under the terms “MPLS”, “VPLS” or “IP-VPN” are uniquely different from stand-alone ATM, frame relay and Ethernet interconnections as they are comprised of additional information service and not merely transmission components. The first and most important component is the MPLS traffic management software application that provides a network interface with labeling, storage and other capabilities that interact with the data being transmitted by the user. The second component are the transmission links provided by ATM, frame relay or IP network. In some situations, the MPLS functions and this transmission will be packaged together with local access transmission capabilities, however the MPLS data management functions can be priced and

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC §160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (“Wireline Broadband Order”), at ¶¶9-15.

⁴ *Id.*

marketed separately from any local transmission circuits. But MPLS itself relies on the use of the intertwined intermediate transmission, using ATM, frame relay, IP-VPN, or even the public Internet. MPLS's information components do not function without the transmission it facilitates, and thus MPLS networks are clearly information services.

Masergy agrees with the Bureau, however, that in event that an MPLS provider also provides the local access between the customer's location and the ingress to the MPLS network, that portion might be telecommunications subject to USF. To the extent that the Instructions are clarifying that MPLS access circuits are telecommunications when offered on a stand-alone basis are telecommunications, then the Bureau is making a clarification within the scope of its Delegated Authority. To the extent that the Bureau is attempting to reclassify MPLS network service as telecommunications, then the Bureau has exceed this authority by creating new Commission policy on the regulatory treatment of MPLS service. In exceeding this Authority, the Bureau would also have violated the provisions of the Administrative Procedures Act by altering Commission policy without an opportunity for notice and comment.⁵ If indeed the Bureau intended for MPLS and other IP-VPN services to be considered telecommunications subject to USF, then the Bureau has radically changed Commission policy, and cannot avoid this conclusion merely by labeling the addition of MPLS into the Instructions as a "clarification".⁶ But, the core portions of the MPLS network services include components that, under existing precedent, are functions which include interactions with customer data and storage functions that render a service as information and not telecommunications.⁷ MPLS also provides a complex traffic management and routing function allowing the various voice, ATM and IP networks to speak a common language and communicate with each other over the

⁵ 5 U.S.C. § 553(b).

⁶ *U.S. Telecom Assoc. v. FCC*, 400 F.3d 29, 30 (DC Cir. 2005).

⁷ See e.g., *Wireline Broadband Order*, at ¶ 14 (describing information functions).

transmission lines already in place and potentially provided by a different telecommunication service provider. But, MPLS goes further than mere routing, and also permits data to undergo protocol conversions of the customer's choosing. The MPLS network therefore interacts with data at the users request, and is not merely conversions done to facilitate transmission. MPLS is clearly a distinguishable service from stand-alone frame relay, ATM or other services that are telecommunications.

The Commission has said that where a routing function is integral to the transmission, it can be considered part of the telecommunications product.⁸ Most recently, the Commission analyzed the integration of audio bridging and transmission and considered, after a careful review of the service that the bridging was telecommunications. Unlike the conferencing bridging service analyzed by the Commission in the recent *Intercall* decision, the MPLS network offers services that are clearly information under the *Wireline Broadband Order*. In the *Intercall* decision, the Commission determined that Intercall "allows end users to transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission)."⁹ In that scenario, there was not sufficient interaction with the customer data to constitute calling the service information. MPLS, however, does contain this information component intertwined with the transmission. As such, unlike the audio conferencing bridge, the MPLS application is properly categorized as an information service.

That the transmission and information are inseparable in an MPLS networks are clear. Local access to MPLS networks, however, are more likely telecommunications. Based on

⁸ *Independent Data Communications Manufacturers Assoc., Inc. and American Telephone and Telegraph Co., Petition for Declaratory Ruling that All IXC's be Subject to the Commission's Decision on the IDCMA Petition, Memorandum Opinion and Order*, 10 FCC Rcd 13717 (1995) ("Frame Relay Order").

⁹ *Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, ¶ 11 (2008).

conversations with sales and technical personnel around the industry, Masergy believes that much of the industry charges USF pass-through to customers on these transmission portions of the service but not the porting and routing functions. While these pass-throughs are, of course, discretionary, this distinction could lead to the inference that much of the industry has analyzed Commission precedent and the nature of MPLS components and services and concluded that MPLS is actually multiple sub-services, with different regulatory classifications. Other providers pass-through surcharges on all portions of MPLS indicating that they like treat even the port functions as integral to the service. Because there is no industry standard here, the Bureau should offer further guidance on what specifically about MPLS is considered telecommunications and what is not.

III. The Bureau Must Provide Further Clarification of Form 499-A Instructions

Unfortunately, the Bureau's attempt to clarify the instructions to the Form 499-A by lumping MPLS together with frame relay and ATM in one clause failed to account for the unique characteristics of MPLS.¹⁰ Instead of acknowledging that MPLS is distinct services, including an information service that is intertwined with telecommunications services that vary based on the customer's needs, the Bureau instead treated MPLS as a stand-alone transmission product like any private network service. As a result, the Bureau must issue a further clarification indicating that MPLS applications are not identical to stand-alone frame relay and ATM services and specifying that the MPLS network services, providing routing and network integration services, DNS and web storage capabilities, are information services and hence not subject to USF contributions. This clarification is essential to ensure that MPLS providers are treating their

¹⁰ Masergy notes that MPLS services were included in the same clause of the instructions as frame relay and ATM services, which implies that such systems are interchangeable and provide the same services. As MPLS can be provided as a stand alone service without transmission circuits, this is a misleading and inaccurate categorization of the application.

MPLS revenues uniformly for the purpose of USF calculations. A clarification issued by the Bureau providing a bright-line definition or description of the distinction between the MPLS network service, which is an information service, and access circuits, which are telecommunications services sometimes packaged with the MPLS application, would provide much needed guidance to these providers.

Masergy respectfully suggests that both the FCC and application providers would be better served by a definition or description of services that must file instead of the *ad hoc* addition of services to the Instructions. The Bureau cannot, by definition, include the name of every new emerging technology that may be subject to USF contributions. As the Commission is well aware, new network applications, routing technologies and system management tools are being developed and improved all the time. It would be futile for the FCC to attempt to include every technology, without any definition or description, in the Instructions. For instance, VPLS, a point-to-multi-point variant of MPLS, would arguably fit under the same construct as MPLS. But, its exclusion from the Instructions leaves that conclusion in question. In addition, the mere exclusion from the list in the Instructions of a new technology which may actually incorporate telecommunications services could lead some companies to conclude that USF contributions are not required on revenue from such services.

Furthermore, the Bureau's addition of services and application types to the Instructions as a method of providing clarification also leaves those service providers without notification of their USF requirements. When notification is not provided, providers are unable to adjust their business plans to account for the "clarified" contribution requirements nor are they able to flow through the USF fees to customers for the previous 13 to 14 month time period. As such, these

clarifications act as a retroactive application of the USF contribution upon these types of services.

IV. Conclusion

Masergy respectfully request the Bureau issue a clarification regarding the inclusion of MPLS in the Instruction to the 2009 Form 499-A and further state that MPLS network services (as opposed to local access to MPLS networks) are information services not subject to USF contributions. If the Bureau is unwilling to so clarify, then Masergy requests that the Commission review the Bureau's action taken under Delegated Authority and reverse it as an alteration of Commission of policy that exceeds the Bureau's Delegated Authority.

Respectfully submitted,



Douglas D. Orvis II
Kimberly A. Lacey
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC 20006

Counsel for Masergy Communications, Inc.

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